IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No .79

MIKE MILANOVICH
and
VIRGINIA MILANOVICH,
Petitioners

vs.

UNTED STATES OF AMERICA
Respondents

On Writ of Certorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONERS

J. HUBBARD DAVIS
1121 National Bank of Commerce Building
Norfolk 10, Virginia
Counsel for Petitioners

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OPINIONS BELOW

The petitioners were convicted in the District Court of the Eastern District of Virginia on a count charging them with Larceny, and also as to Virginia Malanovich on a count charging her with receiving stolen goods. Judgement of the District Court was affirmed by the Court of Appeals, 275 F., 2d, 746 (Fourth Circuit 1960), Certiorari granted, 80 S. C. 1598, 28L.W. 3368 (June 20, 1960).

JURISDICTION

The judgement of the United States Court of Appeals for the Fourth Circuit was entered on March 8th, 1960. Writ of Certiorari was granted on June 20th, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTE INVOLVED

18 United States Code 641, provides:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department of agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or whoever receives, conceals, or retains the same with intent to convert it to his use, or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000.00 or imprisioned not more than ten years, or both; but if the value of such property does not exceed the sum of One Hundred Dollars, he shall be fined not more than One Thousand Dollars or imprisonment more than one year, or both."

QUESTIONS PRESENTED

1. Court erred in failing to instruct the jury that a conviction would not lie for both Larceny and receiving stolen goods. This question is applicable to

Virginia Milanovich, as she alone was convicted of both offenses.

2. Court erred in failing to instruct the witnesses not to discuss their testimoney, which was prejudicial error.

STATEMENT OF THE CASE

The petitioners, Mike Milanovich and Virginia Milanovich, husband and wife, and others, were charged in a four count indictment of certain larcenies. Petitioner, Mike Milanovich, was found guilty of the Larceny charged in Count 2, from the United States Naval Amphibious Base, Little Creek, Virginia, The petitioner, Virginia Milanovich, was also found guilty of the Larceny charged in Count 2, Amphibious Base, and in addition, she was found guilty of receiving and concealing stolen goods (same goods as set forth in Count 2) charged in Count 4. (R. 9, 10, 11 and 12). The petitioners were tried by jury and upon their conviction the Court sentenced Mike Milanovich to serve a term of five years. Virginia Milanovich received a ten year sentence for the Larceny, and a concurrent five year term of imprisonment for the receiving. On appeal, the Court of Appeals vacated the conviction of Virginia Milanovich on the receiving charge, and affirmed the Larceny conviction of both petitioners, one judge concurring in part and dissenting in part. (R. 345 et seq.)

The testimony against the Milanovichs consisted chiefly of that of the three accomplices Benjamin T.

Guerrieri, Christ Sofocleous, and Clayton T. Grimmer, all of Youngstown, Ohio. (R. 85, 132 and 158). The three accomplices stated that they, together with the petitioners, had previously planned the robbery (R 87, 93), that all five drove at night in Mike Milanovich's automobile (R. 93) to the Amphibious Base, and that the three accomplices actually broke into the Commissary Store on the Base where they opened the safe (R. 94), while the Milanovichs waited in their automobile outside the Commissary. The break-in at the Amphibious Base Commissary took longer than had been anticipated. The Milanovichs left the Base and did not wait, as had been planned, for their confederates to finish. (R. 95). The three accomplices then buried the money in the vicinity of the Commissary Store (R.95) and left the Base by way of the river bank through a hole under the fence. (R 95). This Larceny took place on June 2, 1958, in the early morning hours.

On June 19, 1958, approximately two weeks later the FBI Agents, after securing permission from Mike Milanovich to search his home, found therein two separate containers containing approximately One Thousand Dollars in silver (R.76). There is no question that the money was found in the Milanovich home, but Virginia Milanovich denies that any part of the money was hers or that she had any part in handling the money. R.239).

Throughout the lengthy jury trial the Trial Judge was asked to admonish the witnesses not to discuss their testimony, this, the Trial Judge refused to do. (R.33, 50, 51, 297, 298). The similarity of the testimony of the

three accomplices, Grimmer, Guerrieri and Sofocleous clearly indicates that they, and they alone intended and were doing all that they could to convict Mike and Virginia Milanovich. At no time did the Court admonish the witnesses not to discuss their testimony. Repeatedly the attorney for the defendants, requested the Court to admonish the witnesses, and the Court said, "You have made very insistent demands about my guarding these witnesses. I do not propose to do it. Now, I am not going to instruct them to do anything." (R. 51).

ARGUMENT

1. Convictions for Larceny and receiving the same property:

The petitioners' attack is not directed at one or more of the independent counts of the indictment, but to the jury's failure, because of erroneous instructions, to elect between the two counts; one, of Larceny; and the other, of receiving.

The crime of Larceny and receiving are separate, distinct, and inconsistent offenses. The two crimes contemplate separate individuals performing entirely different roles. Both at common law and under the Federal Statutes, the settled rule is that a person cannot be convicted for stealing goods and receiving them also. 2 Wharton's Criminal Law and Proceedure (1957 Edition) Section 566; 45 A. M. JUR., Receiving Stolen Property, Section 2. In Heflin vs. United States, 358 U. S. 415 (1959) at 419, the Court said, "It seems clear that Sub-section (c) was not designed to increase

the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery. — but in view of the Legislative History of Subsection (c) we think Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves".

In Heflin, the Supreme Court, observed that the Legislative History of Section 2113 (c) was meager, pointing out that Sub-section (c), which dealt with receiving, came into the law later than the Sub-section pertaining to the actual robbing of a bank. The same is true of Section 641, under which Virginia Milanovich was prosecuted. The first paragraph, made it an offense to steal Government property, having its origin in the Act of March 2nd, 1863, Chapter 67, 12 Statutes 696, 698; The second paragraph, pertains to receivers having its derivation from the Act of March 3rd, 1875, Chapter 144, Section 2, 18 Statutes 479. There is nothing in the Legislative History of the two sections, 641, and 2113, which would require a different interpretation. Therefore it appears that it was not the Congressional purpose to punish for stealing Government property and also receiving the same. It is now settled that one may not be convicted for robbing a bank and also for receiving the fruits of the crime. Heflin vs. U. S. (Supra).

Under the evidence presented to the jury, Virginia Milanovich could have been found guilty of either Larceny or receiving but not both. The failure

of the District Court to instruct the jury, as requested, that they could not convict her of both Larceny and receiving the stolen goods was prejudicial and harmful error. The judge should not indicate to the jury that the Larceny and not the receiving is the principal offense. But a proper instruction should have been given to the jury that they could convict of either Larceny or receiving but not both. This instruction was not given.

Virginia Milanovich was not a principal in the first degree; i.e., one of the actual thieves, and the evidence did not overwhelmingly establish Larceny rather than receiving. The jury which admittedly deemed the evidence sufficient to establish both offenses, might well have thought the evidence of receiving was the more creditable; if told that they could convict of one charge only, they might have well preferred the receiving count. For the receiving, Virginia Milanovich was given only five years. The choice should have been left to the jury, and since they might reasonably have convicted of receiving instead of Larceny, and since a lesser sentence was imposed for receiving, this Court should not allow the greater sentence to stand, but refer the case back to the jury under proper instructions.

Virginia Milanovich's complaint is that if the jury had been correctly instructed, the jury might have elected to acquit of Larceny and convict of receiving, for which the sentence imposed was only five years. The two counts are not independent but interrelated. They do not affect each other. Either standing alone

would be good, but standing together, convictions upon both are inconsistent as a matter of law, when directed against the same person.

In Commonwealth vs. Haskins, 128 Massachusetts 60 (1880) the leading case on the subject, the defendant was indicted for Larceny of a Cow and receiving it knowing it to have been stolen. The jury found him guilty of both counts, but after the verdict, the Trial Judge, upon the State's motion allowed a nolle prosequi to be entered as to the receiving count.

Reversing the conviction the Supreme Judicial Court of Massachusetts said: "The record, therefore, notwithstanding the entry of the nolle prosequi shows that the defendants had been convicted by the jury upon both counts; and although, as a legal effect if the conviction upon each count it cannot be said strictly that it is an acquittal upon the other, yet the finding of guilty upon both is inconsistent in law, and is conclusive of a mistrial—, to assume that the error is corrected by nolle prosequi of either count by the District Attorney, is to permit the District Attorney to determine, instead of the jury, upon which count the defendants were guilty. But the nolle prosequi corrects no error, and has no affect upon the record as it stood prior its entry. A record showed a verdict so inconsistent with itself, and so uncertain in law, that no judgement could be entered upon it."

There appears to be no Federal cases exactly in point, as to the appropriate remedy where there is a concededly erroneous conviction for both stealing and receiving the same goods; yet the State cases have gen-

erally reversed such convictions. Commonwealth vs. Haskins (Supra). In the case of Virginia Milanovich, in Milanovich vs. United States, 275 F. 2d 716 (Fourth Circuit 1960), the majority said; "In light of the Supreme Court's decision in Heflin, we think the appropriate instruction to the jury should have been to acquit on the receiving count if it should find her guilty on the Larceny count. Since the jury's findings are plain, this conditional direction of an acquittal on the receiving count can be done as well after the verdict as before. This is what the Supreme Court did in Heflin."

"The case is within the rule of affirmates of the judgment of committment if supported by proper conviction upon one count notwithstanding the fact that a concurrence sentence was improperly imposed upon another count."

"The sentence on the receiving count will be vacated, but that does not require a reversal of the judgment".

To follow the majority opinion of the Fourth Circuit set forth above is to arrive at a result contrary to the traditional idea concerning Larceny and receiving, that they are separate, distinct and inconsistent offenses. In Heflin, the defendant moved to vacate his sentence under 28 U. S. C. Section 2255, while here we have a direct appeal from the conviction, not an attempt to revise a sentence. Both the District Court and the Fourth Circuit Court of Appeals have by their decisions negated the jury trial which was prayed for by Virginia Milanovich. There the jury pronounced guilt

on two counts where under proper instructions conviction could only be for one count, neither the District Judge nor the Appellate Judges should take it upon themselves to speculate which count the 12 Jurors would have unanimously picked if they had been correctly instructed. By vacating the sentence on the receiving count the Appellate Judges are taking the case from the jury and depriving Virginina Milanovich of her liberty unjusfly.

As we cannot be certain what the jury would have decided if the proper charge had been given, the doubt should be resolved in her favor. Therefore, a new trial should be awarded Virginia Milanovich under proper instructions. This is a Jury question and not one for the courts to determine and had the jury been properly instructed we do not know whether she would have been found guilty of Larceny or receiving, but certainly she cannot be found guilty of both.

2. Failure to instruct the witnesses not to discuss their testimony:

The exclusion of the witnesses loses all of its value if they are not admonished not to discuss their testimony. This of course, is discretionary with the Court, but when it is brought to the Court's attention that the witnesses are discussing their testimony with each other the request should be granted. The failure of the Court to so instruct the witnesses was prejudicial error and deprived Mike and Virginia Milanovich of a fair and impartial trial. This failure of the Court to so instruct the witnesses was harmful error.

The manifest purpose of the rule being to secure trust and promote the ends of justice and to have testimony of a witness uninfluenced with the testimony of other witnesses. Roberts vs. State, 25 So. 238, 240; 122 Ala, 47), and to prevent concert of action among witnesses. State vs. Pell, 119 N.W. 154, 140 Iowa 655.

In this particulaar case it was thought essentially necessary to prevent the material witnesses from discussing their testimony. The defendants were contending throughout the entire trial that the charges against them were a "frame-up", conceived by the three accomplices, Grimmer, Guerrieri and Sofoceous, who had plead guilty and were the key Government witnesses. These wtnesses had the opportunity to get together and collude, which is apparent by the record. As the witnesses were not instructed not to discuss their testimony, Mike and Virginia Milanovich should be given a new trial, as it was harmful error.

CONCLUSION

For reasons previously stated, and as it is not for judges but for the jury, where a Jury Trial has been prayed, to find a verdict of guilty, however plain the case may appear to be, so Judges may not assume to choose between alternatives available to the jury. As the Judges in this case have invaded the province of the Jury the petitioners ask that the convictions as they now stand be reversed and a new trial awarded to them.

As to Virginia Milanovich it is not for the Judges to speculate which count the 12 Jurors would have

unanimously picked had they been correctly instructed, therefore as Virginia Milanovich was found guilty of both the Larceny and the receiving, the case should be sent back to the Jury under proper instructions for a new trial.